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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM MICHAEL DALBY, Defendant and Appellant.	C041880 (Sup.Ct.No. CRF993920)

APPEAL from a judgment of the Superior Court of Yolo County, Stephen L. Mock, J. Affirmed and remanded.

Mark D. Greenberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Senior Assistant Attorney General, Stan Cross and Julie A. Hokans, Deputy Attorneys General, for Plaintiff and Respondent.

The Yolo County District Attorney charged defendant William Michael Dalby with 22 counts of aggravated sexual assault of a child under the age of 14 (Pen. Code, § 269, subds. (a)(1), (a)(3) & (a)(4) -- counts 1-22), two counts of oral copulation of a child under the age of 14 (§ 288a, subd. (c)(1) - counts 23-24), and one count of failure to appear on a felony charge

while released on bail (§ 1320.5 - count 28).[1] Alternatively, the information charged defendant with three counts of continuous child sexual abuse of three of the four young, female victims. (§ 288.5, subd. (a) - counts 25-27.)

The jury convicted defendant of 16 counts of violating section 269, one count of violating section 288a, three counts of violating section 288.5, and one count of violating section 1320. Noting that the district attorney properly charged defendant with continuous child sexual abuse as an alternative to the individual sexual offenses, the trial court reversed defendant's convictions of continuous child sexual abuse in counts 25, 26 and 27.

The trial court sentenced defendant to a determinate term of six years in count 23, and eight months, or one-third the middle term, in count 28. It sentenced him to 16 consecutive terms of 15 years to life in counts 1 through 3, and 9 through 22.[2] The total determinate and indeterminate sentence was 246 years 8 months. The court also imposed a $200 restitution fine (§ 1202.4, subd. (b)) and a $200 parole revocation fine which was suspended (§ 1202.45).

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[1] Undesignated statutory references are to the Penal Code.

[2] In part V of this opinion, we discuss the trial court's inadvertent inclusion of count 21 when pronouncing defendant's indeterminate sentence of 240 years to life on 16 counts of violating section 269.

Defendant raises four issues on appeal: (1) the trial court's refusal to instruct the jury with CALJIC No 17.03 on alternative verdicts requires reversal of all counts except 23 and 28; (2) the instruction on testimony of children under ten, CALJIC No. 2.20.1, was ambiguous and likely to be understood as unconstitutionally relieving the district attorney of his burden of proof; (3) the case must be remanded for resentencing to allow the trial court to consider concurrent sentences for the convictions under section 269 which the court mistakenly believed to be mandatory under section 667.6, subdivision (d); and (4) a sentence of 246 years and 8 months to life is cruel and unusual punishment within the meaning of the federal and state Constitutions.

The United States Supreme Court decided *Blakely v. Washington* (2004) ____ U.S. ____ [159 L.Ed.2d 403] (*Blakely*) the day after this case was submitted for decision. In supplemental briefing filed pursuant to our miscellaneous Order 2004-006, defendant argues *Blakely* controls the question whether the trial court or the jury should have decided which of the alternative counts would stand -- the convictions of 16 counts of specific sexual offenses or the convictions of three counts of continuous child sexual abuse. He also maintains that the jury, not the trial judge, should have determined the facts warranting consecutive sentences under section 677.6, subdivision (d) or section 1170.1.

We conclude the trial court erred in imposing what it believed to be mandatory consecutive sentences of 15 years to

life pursuant to section 667.6 in counts 1 through 3 and 9 through 22, and shall remand for resentencing. We affirm the judgment in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

In December of 1995, defendant and his long-time girlfriend Tammy moved into a house together. Living with them were Tammy's two daughters, S. and C., and Tammy's niece, D., who Tammy had legally adopted. Tammy also served as a foster parent for A. and her sister M. after Child Protective Services (CPS) removed the two girls from the home of their mother D. in July 1997.

After CPS returned A. and M. to their mother in 1999, A. told her cousin K. that defendant had molested her. D. called CPS and the West Sacramento Police Department on May 24, 1999, after talking with A.

The ensuing investigation led to the removal of S., C., and D. from the home of defendant and Tammy on July 1, 1999. A police detective interviewed and arrested defendant on July 2, 1999. He was released from jail the following month. Defendant did not appear for his preliminary hearing on February 18, 2000, and Yolo County authorities began a nationwide search with the help of the United States marshals. Defendant was arrested in Louisiana on January 17, 2001.

All four victims testified at trial. The prosecution also played videos of the police interviews with each child. We need not detail the trial testimony for purposes of this appeal.

DISCUSSION

I

CALJIC No. 17.03 on Alternative Charges

Defendant asked the court to instruct the jury on alternative charges using CALJIC No. 17.03 (6th ed. 1996), which read, in relevant part:

"The defendant is accused in Count ___ of having committed the crime of _____ and in Count ___ of having committed the crime of _____. These charges are made in the alternative and in effect allege that the defendant committed an act or acts which constitute[s] either the crime of _____ or the crime of _____. If you find that the defendant committed an act or acts constituting one of the charged crimes, you then must determine which of the crimes so charged was thereby committed. [¶] In order to find the defendant guilty you must all agree as to the particular crime committed, and, if you find the defendant guilty of one, you must find [him][her] not guilty of the other[.] . . ."

The trial court refused to give the instruction, and explained: "As to 17.03, it's true that Counts 25 through 27 are allegations of violations of 288.5 and it's true that that statute says in subdivision (c) that it's to be charged as an alternative to other offenses, but the only published case we have, and that is People vs. Valdez [(1994) 23 Cal.App.4th 46 (Valdez)], says that in essence the jury should decide them all and it should state [sic] any offenses other than 288.5 convictions, if there are any. [¶] And the crimes are not

really alternative to one another. [¶] Now, I did Shepardize Valdez. [The prosecutor] already pointed out that there were two cases that disagree with it. Both of those cases have been granted review by the Supreme Court. No decision has been reached. I don't know what we can make of that. But since this is the only published case on point, I am going to follow it."

The California Supreme Court decided *People v. Johnson* (2002) 28 Cal.4th 240 (*Johnson*) after defendant's trial but before he was sentenced. *Johnson* reversed *Valdez, supra,* 23 Cal.App.4th 46, in part. It held that because section 288.5, subdivision (c) clearly mandates charging continuous child abuse and specific sexual offenses against the same child during the same period only in the alternative, prosecutors may not obtain multiple convictions in that circumstance. (*Johnson,* at p. 247.) At sentencing, the trial court applied the remedy used in *Johnson* and reversed defendant's convictions of continuous child sexual abuse in counts 25, 26 and 27.

On appeal, defendant contends we must reverse all counts except counts 23 and 28 because the trial court erred in refusing to instruct with CALJIC No. 17.03 and failing to submit alternative verdicts to the jury. He cites the language of section 288.5, subdivision (c),[3] and argues the Legislature's

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[3] Section 288.5, subdivision (c) provides: "No other felony sex offense involving the same victim may be charged in the same proceeding with a charge under this section unless the other charged offense occurred outside the time period charged under this section or the other offense is charged in the alternative. A defendant may be charged with only one count under this

requirement that continuous child sexual abuse and specific sexual offenses be charged in the alternative "necessarily implies that there be a *verdict* in the alternative and, by extension, a *jury verdict* in the alternative." Defendant also maintains the trial court's refusal to allow the jury to determine which of the alternative counts required conviction and which required acquittal violated his due process rights. As we shall explain, the trial court did not err in denying defendant's request to instruct the jury in accordance with CALJIC No. 17.03. Nor did the procedure followed by the trial court deny defendant his constitutional right to due process.

The parties' briefs highlight three cases that shed some light on the issues raised by defendant: *Valdez*, *supra*, 23 Cal.App.4th 46; *Johnson*, *supra*, 28 Cal.4th 240; and *People v. Torres* (2002) 102 Cal.App.4th 1053 (*Torres*). In *Valdez* the prosecution charged and convicted defendant of continuous child sexual abuse under section 288.5 and separate, specific lewd acts with the same child. (*Valdez, supra,* 23 Cal.App.4th at p. 48.) The *Valdez* court read section 288.5, subdivision (c), as a bar to double punishment, not multiple convictions. As we explained, it held that section 288.5 permitted prosecution for both continuous sexual abuse of a child and specific sexual offenses against the same child during the same period, and "the

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section unless more than one victim is involved in which case a separate count may be charged for each victim."

sentences imposed on the lesser of the 'alternative' crimes should merely be stayed." (*Id.* at pp. 48-49.)

The Supreme Court reached a different conclusion in *Johnson*, where the prosecution had again failed to charge continuous child sexual abuse and the specific sexual offenses in the alternative. Because the *Johnson* court held that section 288.5, subdivision (c) barred multiple convictions, it approved a different remedy -- reversal of the specific counts. (*Johnson*, *supra*, 28 Cal.4th at pp. 244, 248.)

In *Torres, supra,* 102 Cal.App.4th at pages 1055-1056, another pre-*Johnson* prosecution that did not charge the crimes in the alternative, the jury convicted defendant of continuous child sexual abuse and 10 individual sexual offenses against the same victim during the same time period. The *Torres* court examined the intent of the Legislature in enacting section 288.5 to determine the appropriate remedy for failure to plead the offenses in the alternative. (*Torres, supra,* at pp. 1055, 1057, 1058-1060.) It concluded that "section 288.5, subdivision (c) gives the prosecutor maximum flexibility to allege and prove *not only* a continuous sexual abuse count, but also specific felony offenses commensurate with the defendant's culpability, subject only to the limitation that the defendant may not be *convicted* of both continuous sexual abuse and specific felony sex offenses committed in the same period. It therefore is also appropriate, in deciding which convictions to vacate as the remedy for a violation of the proscription against multiple convictions set forth in section 288.5, subdivision (c), that we leave appellant

standing convicted of the alternative offenses that are most commensurate with his culpability." (*Id.* at p. 1059, original italics.) In *Torres*, the trial court had imposed a longer aggregate sentence for the specific offenses and stayed execution of the sentence on the section 288.5 violation. The appellate court concluded that the appropriate remedy was to reverse the conviction for violating section 288.5 which carried the lower sentence. (*Id.* at pp. 1060-1061.)

This case differs from *Johnson, supra,* 28 Cal.4th 240 and its progeny because the prosecutor did, in fact, charge continuous child sexual abuse under section 288.5 in the alternative to the individual violations of section 269 in the first instance. In *Johnson* and *Torres,* the courts approved or fashioned a remedy where there was no alternative charge and the jury found the defendant guilty on all counts. Here, we consider for the first time the practical implications of the *Johnson* decision at trial: Does section 288.5 require the trial court to instruct the jury to render a verdict in the alternative pursuant to CALJIC No. 17.03, or does the statute authorize the trial court to decide which charges to reverse?

Although the prosecutor must charge continuous child sexual abuse and specific sexual offenses in the alternative under section 288.5, subdivision (c), we agree with the trial court that CALJIC No. 17.03 should not be given in these circumstances. The instruction "is . . . designed to be given only when the defendant cannot be legally convicted of more than one count because two or more counts are charged in the

alternative." (*People v. Crowell* (1988) 198 Cal.App.3d 1053, 1060, fn. 8 (*Crowell*).) Thus, the trial court is required to instruct sua sponte with CALJIC No. 17.03 where defendant is accused of stealing a vehicle and receiving the same stolen vehicle because he cannot legally be convicted of both. (*People v. Black* (1990) 222 Cal.App.3d 523, 525; see *People v. Jaramillo* (1976) 16 Cal.3d 752.) The instruction is appropriate where defendant is charged with both the greater offense of possession of methamphetamine for sale (Health & Saf. Code, § 11378) and the lesser offense of possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)). (See *People v. Crone* (1997) 54 Cal.App.4th 71, 73, 76.) Similarly, where defendant is charged with both attempted murder (§§ 644 & 187) and assault with a deadly weapon and by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)), the jury was properly "instructed in accordance with CALJIC No. 17.03 that these two counts charged only one crime, and if they found appellant guilty of one count, 'you must find him not guilty of the other.'" (*People v. Lewis* (1993) 21 Cal.App.4th 243, 251, fn. 6.)

However, this court held that the trial court did not err in refusing to give CALJIC No. 17.03 where defendant was charged in separate counts with burglary and receiving stolen property. (*People v. Carr* (1998) 66 Cal.App.4th 109, 112, 115 (*Carr*.) A burglary can be committed without committing a theft and theft is not a lesser included offense within burglary. (*People v. Bernal* (1994) 22 Cal.App.4th 1455, 1458 (*Bernal*).) Because the

separate counts were separate crimes, there was no legal or factual bar to defendant's conviction of burglary and receiving the property that he stole in the burglary. (*Carr*, *supra*, at pp. 114-115; *Bernal*, *supra*, 22 Cal.App.4th at p. 1458.)

The California Supreme Court acknowledged in *Johnson* that "continuous sexual abuse and other sexual offenses, lacking certain common elements, do not stand in the relation of greater and lesser included offenses." (*Johnson*, *supra*, 28 Cal.4th at p. 246.) *Valdez* explained that they are not "alternative" in the sense that commission of one necessarily constitutes an acquittal of the other. (*Valdez*, *supra*, 23 Cal.App.4th at p. 49.) We conclude that in this context it is incorrect to instruct a jury with CALJIC No. 17.03 that it must find defendant not guilty of one of the charged offenses if it finds him guilty of the other. (*Carr*, *supra*, 66 Cal.App.4th at pp. 114-115.)

Defendant nonetheless contends that because section 288.5 requires the prosecution to charge continuous child sexual abuse and specific sexual offenses in the alternative, the Legislature intended that the *jury* return alternative verdicts. Nothing in the language or purpose of section 288.5 supports this contention. Moreover, there are significant practical and legal impediments to proceeding in the manner he suggests.

"Our role in construing a statute is to ascertain the intent of the Legislature in order to effectuate the purpose of the law. [Citation.] Because the statutory language is generally the most reliable indicator of that intent, we look

first at the words themselves, giving them their usual and ordinary meaning and construing them in context. [Citation.] If the plain language of the statute is clear and unambiguous, our inquiry ends, and we need not embark on judicial construction. [Citations.] If the statutory language contains no ambiguity, the Legislature is presumed to have meant what it said, and the plain meaning of the statute governs. [Citations.]" (*Johnson*, *supra*, 28 Cal.4th at p. 244.) However, if the initial steps in the process do not reveal a clear meaning, we "apply reason, practicality, and common sense to the language at hand. If possible, the words should be interpreted to make them workable and reasonable . . . in accord with common sense and justice, and to avoid an absurd result." (*Halbert's Lumber, Inc. v. Lucky Stores*, *Inc*. (1992) 6 Cal.App.4th 1233, 1239.)

Section 288.5 is ambiguous because it makes no reference to alternative *verdicts* or *who decides* whether defendant shall stand convicted of continuous child sexual abuse or the specific sexual offense or offenses charged in the information. Given the practical realities we shall describe, it is entirely possible that the omission reflects the Legislature's intent to leave to the trial court the decision whether to provide the jury with alternative verdicts or, under the procedure followed in *Johnson, supra*, 28 Cal.4th 249, exercise its own discretion to resolve the matter after the jury renders its verdicts on all counts. Defense counsel conceded at oral argument that there would be no constitutional problem if the Legislature gave the

trial judge discretion to decide which convictions should stand. In *Johnson*, the California Supreme Court approved that approach as a remedy for the prosecution's failure to charge in the alternative under section 288.5. (*Johnson, supra,* at p. 248.)

The Legislature enacted section 288.5 in 1989 in response to the decision in *People v. Van Hoek* (1988) 200 Cal.App.3d 811, disapproved in *People v. Jones* (1990) 51 Cal.3d 294, 322. (Stats. 1989, ch. 1402, § 1, p. 6138.) The *Van Hoek* line of cases had reversed convictions of resident child molesters based on "generic" testimony that was unspecific as to time and place. (*Johnson*, *supra*, 28 Cal.4th at p. 247.) The Legislature stated that its intent in enacting section 288.5 was "*to provide additional protection* for children subjected to continuing sexual abuse *and certain punishment* for persons referred to as 'resident child molesters' by establishing a new crime of continuing sexual abuse of a child under circumstances where there have been repeated acts of molestation over a period of time, and the perpetrator either resides with or has recurring access to the child." (Stats. 1989, ch. 1402, § 1, p. 6138, italics added.) "[T]he Legislature apparently was not seeking to multiply potential convictions or punishments for such offenders, but rather to subject them to 'certain' punishment by lowering the unanimity hurdle against which many molestation prosecutions evidently had stumbled." (*Johnson*, *supra*, 28 Cal.4th at p. 247.) Section 288.5 provided an insurance policy of sorts, a fallback position when the victim could not provide details regarding defendant's abuse at trial.

Experience demonstrates that not every prosecution under section 288.5 involves generic testimony. Where, as here, the evidence is specific enough to support jury verdicts convicting a defendant of both continuous child sexual abuse and separate, specific counts of sexual abuse, the only principled way for either a jury or trial judge to differentiate between the 288.5 violation and the specific offense or offenses is by length of sentence. However, the jury is not privy to that information. Indeed, it is instructed not to consider penalty when deciding an accused's guilt or innocence. (*People v. Shannon* (1956) 147 Cal.App.2d 300, 306; see CALJIC No. 17.42 (Jan. 2004 ed.) To ask the jury to return alternative verdicts in cases alleging continuous child sexual abuse and specific acts of abuse in the alternative -- where there is no other basis for differentiating between them -- invites the jury to speculate on penalty.

The Legislature cannot have intended the jury to unlawfully consider penalty in deciding whether to convict or acquit a defendant of the alternative counts. In any event, we will not condone such an absurd result by adding language to section 288.5 to require the jury to return alternative verdicts.

Defendant also contends the trial court's decision to reverse his convictions under section 288.5 does not meet the due process requirements articulated in *Hicks v. Oklahoma* (1980) 447 U.S. 343 [65 L.Ed.2d 175] (*Hicks*). Unlike California, in Oklahoma a convicted defendant was entitled to have the jury fix his punishment under statutory law. The court instructed the

jury in accordance with the recidivist statute then in effect that if it found Hicks guilty, it was required to impose a mandatory 40-year-prison term. The jury returned a guilty verdict and imposed the mandatory term. (*Id.* at pp. 344-345 [65 L.Ed.2d at pp. 178-179].) After Hicks's conviction, the Oklahoma Court of Criminal Appeals declared the mandatory 40-year sentence unconstitutional in another case. Hicks unsuccessfully sought to have his sentence set aside as well. The Oklahoma Court of Criminal Appeals reasoned that the unconstitutional statute did not prejudice him because his sentence was within the range of punishment the jury could have imposed. The United States Supreme Court granted certiorari and vacated the judgment. It ruled there was a substantial possibility the jury would have returned a sentence of less than 40 years had it been instructed correctly. (*Id.* at pp. 345-346 [65 L.Ed.2d at pp. 179-180].)

In this case, defendant maintains that if the jury had been given the option of alternative verdicts, "[it] may well have determined that the charges of continuous sexual abuse more accurately reflected the state of the evidence." He insists this was "structural error" subject to per se reversal. The principal flaw in defendant's argument is that section 288.5 does not state whether the jury or the trial court determines which of the alternative charges the defendant shall stand convicted. We already concluded the Legislature could not have intended that the jury be required to make that determination.

II

CALJIC No. 2.20.1 on Children's Testimony

The trial court instructed the jury with CALJIC No. 2.20.1 (6th ed. 1996) on how to evaluate the testimony of a child under ten years of age. The instruction read:

"In evaluating the testimony of a child ten years of age or younger, you should consider all of the factors surrounding the child's testimony, including the age of the child and any evidence regarding the child's level of cognitive development.

"A child, because of age and level of cognitive development, may perform differently than an adult as a witness, but that does not mean that a child is any more or less believable than an adult. You should not discount or distrust the testimony of a child solely because he or she is a child."

"When I use the word cognitive, that means the child's ability to perceive, to understand, to remember and to communicate any matter about which the child has knowledge."

Defendant acknowledges that courts have upheld CALJIC No. 2.20.1 against the claim it confers special deference to a child's testimony, thereby reducing the prosecution's burden of proof beyond a reasonable doubt. (See *People v. Jones* (1992) 10 Cal.App.4th 1566, 1572-1574; *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1392-1394 (*Gilbert*); and *People v. Harlan* (1990) 222 Cal.App.3d 439, 455-457.) At the same time, defendant contends that these cases "glibly overlook serious problems inhering in the instruction's loose and inconsistent use of language." He insists that the instruction is "at least ambiguous" and there is a "reasonable likelihood that the jury

understood the instruction in accord with an unconstitutional meaning." Defendant's challenge focuses on the first sentence of the second paragraph of the instruction. He complains "the disclaimer of a substantial difference between children and adults is *un*true if 'age' and level of 'cognitive development' refers to the child's ability to have perceived, understood, and remembered *the events* to which he is testifying in court. These matters go directly and fundamentally to the issue of the child's credibility and not to the child's capacity to conduct himself or herself in court as an adult." We reject defendant's contentions.

First, there is no ambiguity in the instruction. Reasonable jurors would understand that it refers to the child's ability to perceive, understand and remember the events about which she was testifying in court -- not simply her "capacity to conduct . . . herself in court as an adult."

Second, CALJIC No. 2.20.1 does not suggest that jurors ignore other factors relevant to assessing credibility. (*Gilbert*, *supra*, 5 Cal.App.4th at p. 1393.) The child's level of cognitive development is just one factor to be considered. (CALJIC No. 2.20.1.) Moreover, we assess the correctness of a particular jury instruction in the context of other instructions read by the trial court. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.) Here, the jury was instructed with CALJIC No. 2.20 (2000 rev.), which lists all the factors relevant to witness credibility, including the ability to perceive and remember.

III

Sentencing Under Sections 269 and 667.6

The jury convicted defendant of 16 counts of violating section 269, which carries a penalty of 15 years to life for each conviction.[4] (§ 269, subd. (b).) The trial court imposed 16 consecutive sentences pursuant to section 667.6, subdivision (d), which reads:

"A full, separate, and consecutive term shall be served for each violation of Section 220, other than an assault with intent to commit mayhem, provided that the person has been convicted previously of violating Section 220 for an offense other than an assault with intent to commit mayhem, paragraph (2), (3), (6), or (7) of subdivision (a) of Section 261, paragraph (1), (4), or (5) of subdivision (a) of Section 262, Section 264.1, subdivision (b) of Section 288, subdivision (a) of Section 289,

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[4] Section 269 provides:

"(a) Any person who commits any of the following acts upon a child who is under 14 years of age and 10 or more years younger than the person is guilty of aggravated sexual assault of a child:

"(1) A violation of paragraph (2) of subdivision (a) of Section 261.

"(2) A violation of Section 264.1.

"(3) Sodomy, in violation of Section 286, when committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.

"(4) Oral copulation, in violation of Section 288a, when committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.

"(5) A violation of subdivision (a) of Section 289.

"(b) Any person who violates this section is guilty of a felony and shall be punished by imprisonment in the state prison for 15 years to life."

of committing sodomy in violation of subdivision (k) of Section 286, of committing oral copulation in violation of subdivision (k) of Section 288a, or of committing sodomy or oral copulation in violation of Section 286 or 288a by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person if the crimes involve separate victims or involve the same victim on separate occasions."

Defendant points out that section 269 is not an offense listed in section 667.6 as subject to mandatory sentencing and "cannot be read into 667.6(d) without abusing the rules of statutory construction." He contends the case must be remanded to allow the trial court to consider concurrent sentences for his convictions under section 269 which it mistakenly believed subject to the mandatory consecutive sentencing provisions of section 667.6, subdivision (d). He acknowledges *People v. Jimenez* (2000) 80 Cal.App.4th 286 (*Jimenez*), which he says "misapplies these rules to find that Section 269 is in fact within the provisions of 667.6(d)." We agree with defendant's criticism of the *Jimenez* analysis and conclude the trial court erred in sentencing defendant to consecutive terms under the mandatory provisions of section 667.6, subdivision (d).

In *Jimenez*, a jury convicted defendant of two counts of violating section 269, subdivision (a)(3), for committing forcible sodomy on a child under the age of 14 years and more than 10 years younger than himself. The court sentenced him to consecutive terms of 15 years to life. (*Jimenez*, *supra*, 80 Cal.App.4th at p. 288.) Jimenez argued on appeal that he was

convicted of violating section 269, not section 286, and therefore consecutive sentencing was not required. (*Id.* at p. 290.) The appellate court rejected Jimenez's argument after construing sections 269 and 667.6 to effectuate what it determined to be legislative intent. (*Id.* at p. 290.)

We quote the *Jimenez* analysis in its entirety: "Section 667.6 was enacted in 1979 (Stats. 1979, ch. 944, § 10, p. 3258); section 269 followed in 1994 (Stats. 1994, ch. 878, § 1). In enacting subsequent statutes, the Legislature is presumed to be aware of existing statutes and judicial decisions. [Citation.]

"Section 667.6 and section 269 serve two different objectives. Subdivision (d) of section 667.6 aggravates sex offenses involving multiple victims or multiple offenses. It was intended by the Legislature to provide increased punishment for cases where defendant's culpability is increased by the 'number and violence of his crimes.' [Citation.] Section 269 was enacted for a different purpose. It increases the penalties for enumerated sexual offenses where the victim is under 14 years of age and the perpetrator is more than 10 years older than the victim. Thus, the Legislature intended to aggravate punishment for forcible sexual offenses where the defendant's culpability is increased by a substantial age disparity.

"Defendant correctly points out that section 667.6, subdivision (d) does not explicitly provide that it applies to violations of section 269. However, he makes too much of this omission, ignoring the fact that violation of section 286 is one of the predicate offenses of section 269; one committing a

forcible sodomy offense with the prescribed age disparity violates section 269. When the jury found defendant had violated section 269 under the circumstances presented here, it necessarily found he had violated section 286 and he had done so by force or fear. Thus, the factual predicate necessary to apply section 667.6, subdivision (d) was proved beyond a reasonable doubt.

"It would be irrational to suppose the Legislature intended that criminals who commit multiple violent sexual offenses would be exempt from the aggravated punishment prescribed by section 667.6 merely because their victims happened to be children under age 14 who were 10 or more years younger than they. Defendant does not proffer any decisional or historical support for his assertion that by enacting section 269 the Legislature created a separate sentencing scheme for violent sexual offenders who prey on a particular class of victims. He fails to account for the fact that characterization of section 269 as such would work to the advantage of pedophiles by exempting them from the additional penalties that would ordinarily result when they commit multiple offenses or prey upon more than one victim." (*Jimenez, supra,* 80 Cal.App.4th at pp. 291-292.)

We disagree with the conclusion that it is "irrational" to suppose the Legislature intended to exclude those convicted of violating section 269 from "the aggravated punishment prescribed by section 667.6" because of the aggravated circumstances of the crime. (*Jimenez*, *supra*, 80 Cal.App.4th at p. 291.) As the *Jimenez* court observed, the Legislature enacted section 269 in

1994, 15 years after it adopted section 667.6. (Stats. 1994, ch. 878, § 1, p. 4434; Stats. 1979, ch. 944, § 10, pp. 3252, 3258.) We, like the *Jimenez* court, presume the Legislature was aware of the mandatory provisions of section 667.6 when it drafted the language of section 269. (*Jimenez*, *supra*, at p. 291.) We also presume the Legislature was aware that Section 269, subdivision (b) provides for an aggravated sentence of 15 years to life for each violation, and that section 669 gave the trial court discretion to sentence multiple violations consecutively or concurrently. Given this sentencing scheme, we conclude it was logical, not absurd, for the Legislature to exclude violations of section 269 from the mandatory provisions of section 667.6, subdivision (d). There was no need to enhance what was already an enhanced sentence. For these reasons, we decline to amend section 667.6 judicially to include violations of section 269 in its mandatory provisions.

The trial court sentenced defendant to consecutive terms of 15 years to life in counts 1 to 3, 9 to 20, and 22 under a mistaken belief section 667.6 made consecutive sentencing mandatory. We shall remand for resentencing to permit the court to exercise its discretion to sentence defendant either consecutively or concurrently on those counts.

IV

Sentencing Under Blakely

Applying the Sixth Amendment to the United States Constitution, the United States Supreme Court held in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*) that other than the

fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be tried to a jury and proved beyond a reasonable doubt. (*Id.* at p. 490 [147 L.Ed.2d at p. 455].) For this purpose, the statutory maximum is the maximum sentence that a court could impose based solely on facts reflected by a jury's verdict or admitted by the defendant. Thus, when a sentencing court's authority to impose an enhanced sentence depends upon additional factual findings, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts. (*Blakely, supra,* 542 U.S. at pp. ___ [159 L.Ed.2d at pp. 413-414].)

Defendant argues the trial court denied him his right to jury trial under *Apprendi* and *Blakely* by: (1) reversing his continuous child abuse convictions in counts 25, 26 and 27, and sentencing him on the 16 specific counts of child sexual abuse; and (2) ruling that consecutive sentences were warranted under section 667.6, subdivision (d) or sections 1170.1 and 669. We consider and reject each argument in turn.[5]

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[5] Defendant states in his supplemental brief that *Blakely* "provides a basis for raising a sentencing issue not arguable under apparently established law before *Blakely*." Citing *United States v. Cotton* (2002) 535 U.S. 625 [152 L.Ed.2d 860]; *People v. Scott* (1994) 9 Cal.4th 331; and *People v. Marchand* (2002) 98 Cal.App.4th 1056 (*Marchand*), the Attorney General nonetheless argues that defendant either waived or forfeited his *Blakely* claims by failing to object at sentencing on *Apprendi* grounds. Because defendant raises an important question of constitutional law, we shall exercise our discretion to address the merits of his claims. (*Marchand*, *supra*, at p. 1061.)

A. Sentencing on the Alternative Counts:

We already rejected defendant's contention that the trial court should have instructed the jury in accordance with CALJIC No. 17.03 and allowed it to determine which of the alternative counts defendant should stand convicted -- the 16 specific counts of child sexual abuse or the three counts of continuous child sexual abuse.[6] In his supplemental brief, defendant contends that the trial court's decision to sentence defendant on the 16 individual counts cannot be "turned into a sentencing technique" to avoid Sixth Amendment implications or cure the lack of a jury determination. He maintains that *Blakely* imposes the requirement of a jury determination even if the decision is deemed a sentencing procedure.

Defendant bases his *Blakely* claim on the fact the trial court's election to sentence defendant on the specific counts of child sexual abuse results in a sentence greater than the statutory maximum sentence on the counts of continuous child sexual abuse which were reversed. He argues: "If the trial court chooses the counts of conviction resulting in the higher sentence, then the higher sentence has been chosen predicated on a finding of guilt for one set of counts and innocence or not-guilty for another. If the higher sentence imposed does not exceed the statutory maximum for the higher sentence itself, it does exceed the statutory maximum of the lower sentence, and

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[6] See discussion at pages 4 through 15, *ante*.

this increase in punishment would not be possible without the findings of acquittal and conviction."

The principal difficulty with defendant's argument is that the jury found defendant guilty beyond a reasonable doubt on the specific counts of child sexual abuse *and* on the three counts of continuous child sexual abuse. That was all the trial court needed in order to sentence on either. Defendant had notice by virtue of the express statutory language that guilty verdicts on the 16 counts of violating section 269 subjected him to a term of 15 years to life on each count, and that the guilty verdicts on the three counts of violating section 288.5 subjected him to a term of up to 16 years on each count. (§§ 269, subd. (b) & 288.5, subd. (a).) He also had notice before sentencing, based on the decision in *Johnson*, that he could not stand convicted of both continuous child sexual abuse and the specific acts of child sexual abuse. Here, as in *Johnson*, reversal of the three counts of continuous child sexual abuse was simply a *remedy* employed by the court to effectuate the holding that under section 288.5, subdivision (d), the prosecution could not obtain convictions on the alternative counts. (See *Johnson*, *supra*, 28 Cal.4th at pp. 244 & 248.) Contrary to defendant's suggestion, the court did not base its reversal of the counts of continuous child sexual abuse on a "finding of . . . innocence or not-guilty."

Here, the record makes clear that the trial court did not rely on any additional factual findings in electing to sentence on the specific counts. (Compare *Blakely, supra,* 542 U.S. at pp. ___ [159

L.Ed.2d at pp. 413-414].) Nor was defendant sentenced without notice "beyond what the law allowed." (*Id.* at pp. ___[159 L.Ed.2d at pp. 418-419, 420].) Accordingly, the trial court's decision to sentence defendant on the 16 specific counts of child sexual abuse, rather than the three counts of continuous child sexual abuse, did not violate the rule of *Apprendi* and *Blakely*.

B. Consecutive Sentences:

Defendant also argues "the trial court had no power to impose consecutive sentences, either for the failure to appear or for the [16] counts of Section 269, in the absence of a *jury* determination of the facts warranting the imposition of the consecutive sentences." (Original italics.) We already concluded that the trial court mistakenly believed that section 667.6, subdivision (d) made consecutive sentencing mandatory on defendant's convictions of violating section 269. We address defendant's argument on consecutive sentences because on remand, the trial court may exercise its discretion under section 669 to sentence defendant to concurrent or consecutive terms on those counts.

Section 669 imposes an affirmative duty on a sentencing court to determine whether the terms of imprisonment for multiple offenses are to be served concurrently or consecutively. (*In re Calhoun* (1976) 17 Cal.3d 75, 80-81.) However, that section leaves this decision to the court's discretion. (*People v. Jenkins* (1995) 10 Cal.4th 234, 255-256.) "While there is a statutory presumption in favor of the middle term as the sentence for an offense [citation], there is no comparable statutory presumption in favor of concurrent rather than consecutive sentences for multiple offenses except where

consecutive sentencing is statutorily required. The trial court is required to determine whether a sentence shall be consecutive or concurrent but is not required to presume in favor of concurrent sentencing." (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923.)

Section 669 provides that upon the sentencing court's failure to determine whether multiple sentences shall run concurrently or consecutively, then the terms shall run concurrently. This provision reflects the Legislature's policy of "speedy dispatch and certainty" of criminal judgments and the sensible notion that a defendant should not be required to serve a sentence that has not been imposed by a court. (See *In re Calhoun, supra*, 17 Cal.3d at p. 82.) It does not relieve a sentencing court of the affirmative duty to determine whether sentences for multiple crimes should be served concurrently or consecutively. (*Ibid.*) Under section 669, a defendant convicted of multiple offenses is entitled to the exercise of the sentencing court's discretion, but is not entitled to a particular result.

The sentencing court is required to state reasons for its sentencing choices, including a decision to impose consecutive sentences. (Cal. Rules of Court, rule 4.406(b)(5); *People v. Walker* (1978) 83 Cal.App.3d 619, 622.) This requirement ensures that the sentencing judge analyzes the problem and recognizes the grounds for the decision, assists meaningful appellate review, and enhances public confidence in the system by showing sentencing decisions are careful, reasoned, and equitable. (*People v. Martin* (1986) 42 Cal.3d 437, 449-450.) But the requirement that reasons for a sentence choice be stated *does not create a presumption or*

entitlement to a particular result. (See *In re Podesto* (1976) 15 Cal.3d 921, 937.)

Therefore, entrusting to trial courts the decision whether to impose concurrent or consecutive sentencing under our sentencing laws is not precluded by the decision in *Blakely.* In this state, every person who commits multiple crimes knows that he or she risks consecutive sentencing. While such a person has the right to the exercise of the trial court's discretion, the person does not have a legal right to concurrent sentencing, and as the Supreme Court said in *Blakely*, "that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned." (*Blakely, supra,* 542 U.S. at p. ___ [159 L.Ed.2d at p. 417].) Accordingly, the rule of *Apprendi* and *Blakely* does not apply to California's consecutive sentencing scheme.

V

Cruel and Unusual Punishment

Defendant argues that the sentence of 246 years 8 months to life is so disproportionate to his crimes that it constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution and article I, section 17, of the California Constitution. Although we conclude defendant waived the constitutional issue by failing to raise it below, we consider and reject the merits of defendant's argument to forestall a future claim of ineffective assistance of counsel. (*People v. Norman* (2003) 109 Cal.App.4th 221, 229; *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27.)

The United States Constitution prohibits only those sentences which are "grossly disproportionate" to the crime. (*Ewing v. California* (2003) 538 U.S. 11, 30 [155 L.Ed.2d 108, 123].) In California, the constitutional test is whether the punishment is "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424.) The California Supreme Court listed three factors for courts to consider in deciding whether a particular punishment is disproportionate to the underlying offense: (1) the nature of the offense and the offender "with particular regard to the degree of danger both present to society"; (2) a comparison of the challenged punishment with punishments for more serious crimes in California; and (3) a comparison of the challenged punishment with punishments for the same offense in other jurisdictions. (*Id.* at pp. 425-427.)

Defendant's argument focuses on his personal history and lack of a criminal record. He also contends that his sentence is, in effect, life without possibility of parole. Defendant notes that specific punishment is reserved for a limited number of crimes, including treason (§ 37), perjury that procures the conviction and execution of an innocent person (§ 128), special circumstance murder (§ 190, subd. (a)), kidnapping for ransom involving the death or serious injury of the victim (§ 209, subd. (a)), and train wrecking causing death (§ 219). He acknowledges that "[a]s serious as [his] conduct was, it did not rise to the level of any of these crimes."

However, defendant's argument completely ignores the nature of his offenses -- the factor that gave rise to the *multiple* consecutive sentences under sections 269, subdivision (b), which defendant now describes as the equivalent of life without the possibility of parole. Seventeen of the 18 counts involved sexual acts with four female victims, each under 14 years of age and more than 10 years younger than the defendant. All were children who resided in defendant's home. The trial court appropriately described the evidence as "egregious." Moreover, there is no question the nature of defendant and his crimes posed a serious danger to society. (*In re Lynch*, *supra*, 8 Cal.3d at p. 425.)

Based on this record, we conclude defendant's sentence was not so "grossly disproportionate" that it "shocks the conscience and offends fundamental notions of human dignity" in violation of the federal or state Constitutions. (*Ewing v. California, supra,* 538 U.S. at p. 30 [155 L.Ed.2d at p. 123]; *In re Lynch, supra,* 8 Cal.3d at p. 424.)

V

Clerical Error

The trial court was correct in sentencing defendant on 16 counts of violating section 269 in counts 1 through 3, counts 9-20, and count 22. The jury found defendant not guilty in count 21. Thus, the trial court misspoke when, at sentencing, it included count 21 in what would have been a 17th count subject to indeterminate sentencing. Count 21 also appears in the

minute order and abstract of judgment, although both documents reflect the correct indeterminate sentence of 240 years to life.

We may correct clerical errors in trial court records on our own motion. (*People v. Mitchell* (2001) 26 Cal.4th 181, 186-188; *In re Candelario* (1970) 3 Cal.3d 702, 705.) "This rule allowing correction of clerical error, whether made by the clerk, counsel, or the court itself, is to be distinguished from the situation involving judicial error, which can only be corrected by appropriate statutory procedure. [Citations.] The distinction between clerical error and judicial error is that the former is inadvertently made while the latter is made *advertently as the result of the exercise of judgment*. [Citations.]" (*People v. Schultz* (1965) 238 Cal.App.2d 804, 808; italics added.) The distinction does not "depend so much on the person making it as it does on *whether it was the deliberate result of judicial reasoning and determination*." (*People v. Anderson* (1976) 59 Cal.App.3d 831, 839; italics added.)

The inherent power to correct clerical error exists in civil as well as criminal cases. The case before us is similar to *Dewees v. Kuntz* (1933) 130 Cal.App. 620, where the trial court transposed figures and entered judgment of $1,750 on a finding that damages totaled $1,570. The appellate court treated the discrepancy as clerical error and reduced the damages to $1,570. (*Id.* at p. 624.) Here, defendant was convicted of 18 of 28 counts. The record supports our view that the trial court's mistaken inclusion of count 21 in the 16

counts subject to indeterminate sentencing was not "advertent" nor the "deliberate result of judicial reasoning and determination." (*People v. Anderson, supra,* 59 Cal.App.3d at p. 839; *People v. Schultz, supra,* 238 Cal.App.2d at p. 808.)

Accordingly, we shall direct the trial court to correct the minute order for the sentencing hearing and prepare an amended abstract of judgment.

DISPOSITION

The sentences in counts 1 to 3, 9 to 20, and 22 are vacated, and the cause remanded to permit the trial court to exercise its discretion under section 669 to sentence defendant either consecutively or concurrently on those counts. The judgment is affirmed in all other respects. The trial court is also directed to delete count 21 from the list of counts for which defendant stood convicted in the amended abstract of judgment. The court shall forward the amended abstract of judgment to the Department of Corrections.

MORRISON, J.

We concur:

BLEASE, Acting P.J.

BUTZ, J.